Version : 7.0

Execution of search warrants on the premises occupied or used by members of Parliament

An Agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of the New Zealand Police.

1. Preamble

1.1 This Agreement sets out an interim procedure to be followed where the New Zealand Police propose to execute a search warrant on premises occupied or used by Members of Parliament in respect of a Police investigation. This Agreement applies to any premises that are subject to the terms of a search warrant that are used or occupied by a member including a member's office in the precincts of Parliament, a member's electorate office, and a member's residence and to any place where electronic records and physical documents relating to the member's activities as a member of Parliament maybe stored or held.

1.2 This Agreement is designed to ensure that search warrants are executed without improperly interfering with the functioning of Parliament and that the member is given a proper opportunity to raise claims for parliamentary privilege in relation to physical or electronic documents or other things that may be on the premises to be searched.

2. Legal background

2.1 "The principle of exemption from legal liability for parliamentary conduct does not mean that criminal acts committed in a parliamentary environment are exempt from prosecution"[1] nor can evidential material be placed out of reach of the Police because it is held on premises used or occupied by the member. Neither Parliament nor the member's premises are a sanctuary.

2.2 However, it can be contempt of Parliament for a person to improperly interfere with the free performance of the member's duties. Standing Order (SO) 399 provides that :

"The House may treat as contempt any act or omission which –

(a) obstructs or impedes the House in the performance of its functions, or
(b) obstructs or impedes any member or officer of the House in the discharge of the member's or officer's duty, or
(c) or has a tendency, directly or indirectly, to produce such a result."

Standing Order 400 provides that "*without limiting the generality of Standing Order 399, the House may treat as contempt...*" a number of things, for example paragraph (c) states:

"Serving legal process or causing legal process to be served within the parliamentary precincts, without the authority of the House or the Speaker, on any day on which the House sits or a committee meets:"

The principles of parliamentary privilege are designed to protect proceedings in Parliament from being questioned in the Courts. The New Zealand and English Courts have accepted the Australian statutory description of the term "proceedings in Parliament".[2] That description is:

[1] Parliamentary Practice in New Zealand – David McGee Third Edition p 619.
[2] Ibid p 621

"...**proceedings in Parliament** means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes –

(a) the giving of evidence before a House or a committee, and evidence so given;
(b) the presentation or submission of a document to a House or a committee;
(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published." [3]

2.5 The seizure of documents and materials under the execution of a search warrant that are "proceedings in parliament" may amount to a breach of privilege. The seizure and subsequent use of material that is protected by parliamentary privilege and its subsequent use may be found to be unlawful.

3. Purpose of the Agreement

3.1 This Agreement is designed to ensure that the Police execute any search warrant in a way which does not amount to a contempt of Parliament and which gives a proper opportunity for claims for parliamentary privilege to be raised and resolved.

4. Application of the Agreement

4.1 This Agreement applies, subject to the requirements of the law, and to any premises used or occupied by the member including:

a. the office of the member located within the precincts of Parliament:[4]
b. the electorate office of the member:
c. any other premises used by the member for private or official purposes on which there is reason to believe that material covered by parliamentary privilege may be located.

4.2 This Agreement should also be followed, as far as possible, if a search warrant is being executed over any other premises and the occupier claims that documents on the premises are covered by parliamentary privilege.

4.3 If the member raises a claim for legal professional privilege in respect of a document, the executing officer should follow the normal procedure that applies in respect of such documents. The fact that legal professional privilege has been claimed by a member does not alter the rules that apply in such cases.

5. Procedure prior to obtaining a search warrant

5.1 A member of Police who is seeking a search warrant in respect of premises listed in paragraph 4.1 should first obtain approval from an Assistant Commissioner or above before applying for the warrant.

5.2 If approval is given, the member of Police should obtain the advice of the Chief Legal Adviser of the Police and the Solicitor-General in the preparation of the affidavit and search warrant, as well as regarding the execution of that search warrant because of the constitutional issues that are implicitly involved in such a search.

[3] Parliamentary Privileges Act 1987 (Australia), s16(2).
[4] The precincts of Parliament are defined in s3 of the Parliamentary Service Act 2000

6. Procedure prior to executing the search warrant

6.1 Within the precincts of Parliament the following procedures apply:

(a) The executing officer should first notify the Speaker and the Clerk of the House of Representatives of the proposed search.

(b) The executing officer, will meet with the Speaker or the Speaker's authorised representative, and the Clerk of the House. The executing officer will outline any obligations under the warrant, the nature of the allegations being investigated, the nature of the material that the Police consider is located in a member's office.

(c) The Speaker may direct the General Manager of the Parliamentary Service to arrange for the relevant premises and/or repository of records within Parliament to be sealed and secured to ensure that the risk of evidence being tampered with or disposed of is minimised.

(d) To minimise the potential interference with the performance of the member's duties, the executing officer should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of the member's staff, prior to executing the warrant.

(e) If the search location is secured to the satisfaction of the executing officer, 24 hours should be allowed to the member and the Speaker to seek legal advice in relation to the search warrant.

7. Executing the search warrant

7.1 The executing officer should comply with the following procedures, unless compliance would affect the integrity of the investigation:

(a) a search pursuant to a warrant should not take place at a time when the House is actually sitting or when a committee on which the member serves is actually meeting:

(b) where practicable the search warrant should be executed at a time when the member or the member's authorised representative is present:

(c) Where the search takes place in the member's office in the precincts of Parliament, the Clerk of the House of Representatives or person authorised by the Clerk should be present during the search.

7.2 If the member, or authorised representative of the member, is present when the search is conducted, the executing officer should ensure that the member, or authorised representative of the member has a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things that are on the premises being searched.

7.3 Before beginning the search the executing officer should seek the agreement of the member or authorised representative of the member, to the procedures (A and B set out below) for dealing with claims of privilege.

7.4 If the member or his authorised representative is not prepared to agree to the procedure outlined above, or some alternative procedure acceptable to the executing officer, the executing officer should proceed to execute the warrant.

7.5 Regardless of the procedure adopted and even where no claim of privilege is made the executing officer should take all reasonable steps to minimise the extent to which

documents that may attract parliamentary privilege are examined or seized and to limit the amount of material that is examined in the course of the search.

7.6 The executing officer should consider inviting the member, or authorised representative of the member, to identify where in the premises those documents which fall within the scope of the search warrant are located in the premises.

7.7 Where practicable, the member of the member's authorised representative must be given an opportunity to take copies of any document seized before they are secured. The copying of the documents must be done in the presence of a member of the Police executing the search warrant.

8. Procedure to be followed if privilege is claimed

8.1 If a member or authorised representative of the member, claims parliamentary privilege in respect of any document or thing the executing officer should ask that person to identify the basis for that claim. If the executing officer considers there is a reasonable basis to the claim the executing officer should follow procedure A. If the executing member considers that the claim is vexatious or frivolous he or she should follow procedure B.

Procedure A

(a) The relevant document/s should be placed in exhibit bags in accordance with the Police investigation procedures for Court exhibits;

(b) Where practicable, the member or the member's authorised representative must be given an opportunity to take copies of any documents seized before they are secured. The copying of the documents must be done in the presence of a member of the Police executing the search warrant;

(c) The disputed items seized should be placed in the safe custody of the Clerk of the House of Representatives or an agreed third party;

(d) An inventory of exhibits should be prepared by the executing officer with the assistance of the member or authorised representative of the member, if present, who shall be invited to confirm the accuracy of the inventory;

(e) Where the member or authorised representative of the member wishes to dispute the seizure of any document listed on the inventory on the ground that the seizure of that document is outside the authority of the search warrant,—

(i) The member shall mark the inventory in such a manner as to indicate the member's objection to the seizure of that document; and

(ii) The Police shall, in the presence of the member, place each document to which such objection is made in an envelope or package, seal the envelope or package:

(f) If the member has made a claim of privilege the member has five working days from the date of delivery of the documents or things to the Clerk of the House or an agreed third party to notify the executing officer that the claim for privilege has been abandoned or to seek a ruling on whether the claim can be sustained. It is a matter for the member to determine in which forum the member should seek that ruling;

(g) If the member makes a claim of privilege, the documents will remain in the possession of the Clerk until the claim is resolved;

(h) If the member has not notified the executing officer within five working days, the executing officer and the Clerk will be entitled to assume that the claim has been

abandoned, and the executing officer will recover the items that were subject to the claim from the Clerk.

Procedure B
If the executing officer is satisfied on reasonable grounds that there is no proper basis for the claim the executing officer should attach a note of that decision to the relevant document or thing and continue the search.

9. Obligations at the conclusion of a search

9.1 The executing officer will notify the Speaker, and the Clerk of the House in any case where a claim of parliamentary privilege has been made by or on behalf of a member.

9.2 The executing officer should provide the member with an inventory of things seized by the Police under the search warrant (whether requested or not). The inventory should be prepared by the executing officer with the assistance of the member or authorised representative of the member, if present, who shall be invited to confirm the accuracy of the inventory. If the member does not hold copies of the things that have been seized, the inventory should contain sufficient particulars of the things seized to enable the member to recall details of those things seized and to obtain further advice.

9.3 The executing officer should inform the member that the Police will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties. The Police should also provide or facilitate access on any other grounds permitted under applicable law or procedures.

9.4 The Police will comply with any law including the requirements set out in the legislation under which the search warrant was issued.

10. Parliamentary privilege not waived

10.1 Although the Speaker may agree to a search within the precincts of Parliament, nothing in this Agreement amounts to a waiver of parliamentary privilege in respect of any material seized or authorises any material seized to later be used in any way that would breach parliamentary privilege.

Signed by:	Signed by:
Hon Margaret Wilson	Howard Broad
Speaker of the House of Representatives	Commissioner of Police

DATED this day of October 2006.

See more information on 2007/4 - Policing Functions within Parliamentary Precincts.

I.17D

Question of privilege concerning the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS

Report of the Privileges Committee

Fiftieth Parliament
(Hon Christopher Finlayson QC, Chairperson)
July 2014

Presented to the House of Representatives

SW173240011981

Contents

I.17B QUESTION OF PRIVILEGE CONCERNING THREE AGREEMENTS

Question of privilege concerning the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS

Summary of recommendations

We recommend to the House that it take note of the committee's suggested amendments to the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS (page 7).

We recommend that the House note our suggestion that agreements of this kind be made available publicly, for example through the parliamentary website (page 7).

We recommend that the agreement on policing functions within the parliamentary precincts be reviewed by the parties to it to update terminology and legislative references, and to provide for a dispute resolution process between the Speaker of the House and the Commissioner of Police for disagreements about the interpretation or application of the agreement (page 9).

We recommend that the agreement on the execution of search warrants provide for a system of "chaperoning" the examination of electronic evidence, and the attendance of an information technology specialist to assist with the execution of search warrants in relation to documents stored electronically (page 11).

We recommend that the agreement on the execution of search warrants contain a single procedure to be followed when material is subject to a claim of parliamentary privilege, based on "Procedure A" in the draft agreement (page 11).

We recommend that the agreement on the execution of search warrants assert that the Speaker determines when a document or information is subject to parliamentary privilege (page 12).

We recommend that clause 6.1(e) of the agreement on the execution of search warrants provide for a default period of 24 hours for the member, the Speaker, and the Clerk of the House to seek legal advice in relation to the execution of the search warrant, but that it allow this period to be lessened or extended by agreement (page 12).

We recommend that the agreement on the execution of search warrants refer to the definition of "proceedings in Parliament", as set out in the Parliamentary Privilege Bill, and set out practical examples of material likely to be privileged (page 13).

We recommend that the agreement on the execution of search warrants provide for a dispute resolution process for disagreements about the interpretation or application of the agreement (page 13).

We recommend that the agreement with the New Zealand Security Intelligence Service be amended to include a statement of principles and purpose (page 15).

We recommend that the agreement with the New Zealand Security Intelligence Service be amended to require that the Speaker be consulted in relation to any interception or seizure warrant to be executed on the parliamentary precincts or in a member's constituency office; and in advance of such a warrant being issued, the Director of the New Zealand Security Intelligence Service should provide a written memorandum to the Speaker of the House setting out the actions done or information held by a member which in their opinion constitute an issue of security concern (page 17).

We recommend that the agreement with the New Zealand Security Intelligence Service specify that the Inspector-General has a role in overseeing the actions of the NZSIS in relation to the agreement (page 18).

We recommend that consideration be given to whether it is necessary for the Speaker of the House to enter into a separate agreement with the Government Communications Security Bureau, in the light of the organisation's potential role in assisting others in exercising their lawful authorities (page 20).

1 Introduction

On 18 September 2012 the Speaker advised the House that he was referring to us for consideration three agreements[1] he had entered into as Speaker, as they involve a question of privilege.[2] In this report we summarise the content of each agreement and any issues raised in relation to it. We also suggest several changes to the agreements that we would like to see pursued.

Recommendation

We recommend to the House that it take note of the committee's suggested amendments to the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS.

Each of these documents seeks to record a mutual understanding about the checks and balances that apply between the protection of the privileges of the House and the ability of enforcement and surveillance agencies to undertake their duties. They do not propose new powers for the agencies or new protections for the House. They provide a framework to help these agencies to ensure they can go about their lawful functions and do not breach the existing protections that apply to parliamentary proceedings.

There is a constitutional basis for having formal agreements between the Speaker and enforcement and intelligence agencies. A legislative body must be able to conduct the business of the governance of the country without disruption or hindrance by coercive or intrusive powers of the State and without interference with the legitimate activities of its elected representatives. In some other countries the effective functioning of the legislature has been impaired where a separation between the legislature and enforcement authorities has not been maintained.

The Speaker has entered into these agreements on behalf of the House, using the Speaker's statutory authority to control the parliamentary precincts under section 26(1) of the Parliamentary Service Act 2000. This is an appropriate way to ensure the interests of the legislature are taken into account.

We would like to see the agreements made easily accessible to the public, and suggest this could be achieved by creating a dedicated area for them on the parliamentary website.

Recommendation

We recommend that the House note our suggestion that agreements of this kind be made available publicly, for example through the parliamentary website.

1 The agreements are an agreement with the Commissioner of the New Zealand Police regarding policing functions within the parliamentary precincts; an agreement with the Commissioner of the New Zealand Police regarding the execution of search warrants on premises occupied or used by members of Parliament; and a memorandum of understanding with the New Zealand Security Intelligence Service and the Minister in Charge of the New Zealand Security Intelligence Service, which covers the collection and retention of security intelligence information about sitting members of Parliament.

2 See Appendix B for the Speaker's reasons for referring the agreements to us.

Experience in other jurisdictions

We considered the approaches taken in other similar countries to these matters.[3] We note that agreements on policing functions and the execution of search warrants are not uncommon, but the agreement with the New Zealand Security Intelligence Service appears to be unique amongst comparable Commonwealth states. Both of the agreements with the Police draw on similar agreements in Australia.

3 A briefing paper prepared by the Parliamentary Library outlining the experience in other jurisdictions is available on the parliamentary website along with other papers relating to our consideration of this matter.

2 Policing functions within the parliamentary precincts

This agreement, between the Speaker and the Commissioner of the New Zealand Police, was entered into in December 2007. It sets out guidelines for the exercise of police powers in investigating offences and maintaining the law within the parliamentary precincts, particularly in relation to entering the buildings.

The Privileges Committee of the 47th Parliament considered a draft of this agreement,[4] and the final agreement included amendments proposed by that committee.

Both the New Zealand Police and the Parliamentary Service told us that the agreement is working well. The agreement ensures the Police understand the importance of ensuring that members of Parliament are not impeded in carrying out their duties while the Police are also carrying out functions within the parliamentary precincts.

We note that some of the terminology and legislative references in the agreement need to be updated. We also suggest the inclusion of a mechanism for resolving any disagreements about the interpretation or application of the agreement. We expect that this mechanism would be most likely to involve the Speaker and the Commissioner of Police.

As for the unlikely case of any disagreement under this agreement regarding whether or not something is a parliamentary proceeding, or is a matter of parliamentary privilege, we suggest a process might be better agreed on a case-by-case basis, depending on the nature of the disagreement.

We discuss in chapter 5 the potential need to update this agreement further following the enactment of the Government Communications Security Bureau Amendment Act 2013.

Recommendation

We recommend that the agreement on policing functions within the parliamentary precincts be reviewed by the parties to it to update terminology and legislative references, and to provide for a dispute resolution process between the Speaker and the Commissioner of Police for disagreements about the interpretation or application of the agreement.

4 *Report of the Privileges Committee on the draft agreement on policing functions within the parliamentary precincts*, I.17E, March 2004.

3 Execution of search warrants on premises occupied or used by members of Parliament

This interim agreement, between the Speaker and the Commissioner of the New Zealand Police, was entered into in October 2006 during the Police investigation into Taito Phillip Field. The agreement on policing functions within the precincts did not cover the execution of search warrants on premises occupied or used by members of Parliament. The interim procedure was needed for the Police to follow when executing a search warrant on any place where records and documents relating to the member's activities as a member of Parliament might be stored or held.

The agreement is drafted in terms that could apply in any situation, not just those of the Field investigation for which it was created initially. It is based upon a draft protocol of the New South Wales Parliament from June 2005, and a memorandum of understanding on the execution of search warrants drawn up in the Australian Commonwealth Parliament in February 2005.

The agreement is designed to ensure that the Police execute any search warrant in a way that does not amount to a contempt of Parliament, and that gives proper opportunity for claims of parliamentary privilege to be raised and resolved.

Many parliaments have a memorandum of understanding or agreement with enforcement agencies about the execution of search warrants within the parliamentary precincts or in members' offices. We consider it would be appropriate for a permanent agreement to be adopted for New Zealand.

We suggest additions to the agreement that we consider would assist in its operation. Several of them are based on changes made in New South Wales subsequent to the drafting of the New Zealand interim agreement. We discuss in chapter 5 the potential need to update this agreement further following the enactment of the Government Communications Security Bureau Amendment Act 2013.

Access to electronic documents

The first addition we suggest relates to the execution of a search warrant in relation to documents stored electronically. When enforcement agencies wish to access such material, their preferred approach is often to seize computer hard drives and remove them in order to clone them so that their content can be examined later, after the hard drives have been returned. Our concern is that such a process is not appropriate where there is any possibility of material covered by parliamentary privilege being on the computer hard drive or other device in question. While the mere act of seizure would not necessarily amount to questioning parliamentary proceedings, it is difficult to reconcile such an approach with the principle that the House has the exclusive right to control its own proceedings. For the House's authority to be upheld, there needs to be an opportunity to identify any matters which might be covered by parliamentary privilege, and to make a claim of privilege. This issue is exacerbated further when material is held on servers which store information for multiple users.

This matter has been considered in the United Kingdom, where a system of "chaperoning" the examination of electronic evidence has been devised, and employed successfully. The system involves making a forensic image or copy of the material being created (by the police, or by parliamentary ICT); this image is then opened in the presence of both parties, and examined using search terms to find any material that might be so closely connected to parliamentary proceedings as to raise an issue of privilege. When such material is identified, it is tagged in the presence of both parties to indicate a possible claim to privilege, and is put to one side. We consider a similar approach should be adopted in New Zealand.

We consider that the agreement should provide for a technical expert to attend the search to help access information stored on a computer or server. The New Zealand Police agreed it would be appropriate for the Parliamentary Service to provide such support in isolating material falling within the scope of a search warrant and subsequently sorting such material according to whether or not it was subject to parliamentary privilege.

Recommendation

We recommend that the agreement on the execution of search warrants provide for a system of "chaperoning" the examination of electronic evidence, and the attendance of an information technology specialist to assist with the execution of search warrants in relation to documents stored electronically.

Assessing claims of privilege

We consider the agreement should be clearer about the consequences of the application of parliamentary privilege during the execution of a search warrant. The procedure in the interim agreement suggests that seizing material covered by parliamentary privilege may amount to a contempt, but it does not clearly state that material cannot be seized if it is covered by parliamentary privilege. We consider this should be addressed in the final agreement by stating that material covered by parliamentary privilege cannot be seized, and that any material taken that is later found to be covered by parliamentary privilege must be returned to the member in question.

The agreement sets out in clause 8.1 two procedures to be followed where a claim is made that material is covered by parliamentary privilege. "Procedure A" is to be followed if the officer executing the search warrant considers there is a reasonable basis to the claim for privilege; "Procedure B" is to be used when the officer believes the claim is vexatious or frivolous.

We do not consider that officers executing search warrants are likely to have the appropriate knowledge to determine the correctness of a claim of privilege. We consider that "Procedure B" should be removed, and that a single procedure should apply to any material where a claim of privilege is made. We discussed this with the Commissioner when he appeared before us and he agreed that this procedure should be removed from the final agreement.

Recommendation

We recommend that the agreement on the execution of search warrants contain a single procedure to be followed when material is subject to a claim of parliamentary privilege, based on "Procedure A" in the draft agreement.

We also considered how any claim of parliamentary privilege would be appropriately assessed. In his evidence to us, the Commissioner agreed that the role of finally determining whether a document is properly subject to parliamentary privilege rests with the Speaker. We suggest that the final agreement should clarify this point.

The Commissioner also suggested that the agreement could provide for a process for managing claims of privilege similar to those used under a search warrant where other types of privilege are claimed (for example, where the Police execute a search warrant on a solicitor's office and material might be subject to legal professional privilege). We note that under "Procedure A" the disputed documents or information would be held by the Clerk of the House or an agreed third party until the matter is resolved. It is a matter for the member of Parliament to decide in which forum to seek a final ruling on the claim of privilege. We also note that the most recent protocol of the New South Wales Parliament provides for the presiding officer of either House to give written reasons for any dispute and for the issue then to be determined by the appropriate House.

In our view it is appropriate that a parliamentary solution be found for assessing claims of parliamentary privilege, and apart from the recommendations already discussed, we do not propose any further changes for the process.

Recommendation

We recommend that the agreement on the execution of search warrants assert that the Speaker determines when a document or information is subject to parliamentary privilege.

Access to legal advice

The agreement requires that a period of 24 hours be allowed for obtaining legal advice, if the search location is secured adequately. We asked the New Zealand Police whether it would support changing this to a "reasonable time", but the Police Commissioner told us he was happy with the current provision, as he was concerned less specific wording could lead to a longer delay than 24 hours.

In practice a search warrant is usually executed without delay in order to preserve evidence. The act of sealing a member's office for the purposes of the execution of a search warrant will draw immediate attention. If the member, the Speaker, and the Clerk of the House have been informed, have a reasonable opportunity to obtain legal advice, and have a representative present, the search can proceed. Similar agreements entered into by other parliaments provide for a "reasonable time".

We understand the Commissioner's concern, but consider that at times a period of less than 24 hours could be appropriate. We would like to see clause 6.1(e) of the agreement reworded to provide for a default of 24 hours, which period could be lessened or extended with the agreement of the member, the Speaker, and the Clerk.

Recommendation

We recommend that clause 6.1(e) of the agreement on the execution of search warrants provide for a default period of 24 hours for the member, the Speaker, and the Clerk of the House to seek legal advice in relation to the execution of the search warrant, but that it allow this period to be lessened or extended by agreement.

Meaning of "proceedings in Parliament"

In his submission, the Commissioner noted recent uncertainty about the interpretation of this phrase, which effectively provides the scope for the agreement. We discussed these issues in our report on the question of privilege concerning the defamation action *Attorney-General and Gow* v *Leigh,*[5] and we recently reported the Parliamentary Privilege Bill to the House. The bill responds to the issues we raised in our report, and includes a definition of "proceedings in Parliament". We would expect the protocol to be updated to reflect this definition, should the bill be enacted.

We consider there is also scope to provide further clarification in the agreement itself about the type of material to which parliamentary privilege may apply, and to give more practical examples of material that is likely to be privileged, and of material that is unlikely to be covered. We note the approach taken in New South Wales, which we believe could provide a useful model for the New Zealand agreement.[6] This agreement provides a general description of the type of material to which parliamentary privilege may apply, and gives examples of material that is likely to be privileged, and of material that is unlikely to be covered. We believe this approach, based on the use to which material is put rather than its content, should be explored for the New Zealand agreement.

Recommendation

We recommend that the agreement on the execution of search warrants refer to the definition of "proceedings in Parliament", as set out in the Parliamentary Privilege Bill, and set out practical examples of material likely to be privileged.

Disagreements and non-compliance

We note the submission of the New Zealand Police that the final agreement should provide for a process to manage any disputes about the interpretation of the agreement, or non-compliance with the agreement.

As we noted in relation to the policing functions agreement, this would be appropriate for circumstances where the disagreement involved the interpretation or application of the agreement.

In the case of any disagreement regarding whether or not something is a parliamentary proceeding, or is a matter of parliamentary privilege, we suggest that any such process might be better agreed on a case-by-case basis, depending on the nature of the disagreement.

Recommendation

We recommend that the agreement on the execution of search warrants provide for a dispute resolution process for disagreements about the interpretation or application of the agreement.

---

5 *Report of the Privileges Committee on the question of privilege concerning the defamation action* Attorney-General and Gow *v* Leigh, I.17A, June 2013.

6 *Memorandum of understanding on the execution of search warrants in the premises of members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council, and the Speaker of the Legislative Assembly*, 2010.

4 Collection of information on a sitting member of Parliament

This memorandum of understanding is between the New Zealand Security Intelligence Service (NZSIS), the Minister in Charge of the New Zealand Security Intelligence Service, and the Speaker; it was entered into in December 2010.

In 2009 the Minister in Charge of the New Zealand Security Intelligence Service requested that the Inspector-General of Intelligence and Security investigate and report on the NZSIS's policies and practices relating to the creation, maintenance, and closure of files on New Zealand citizens and its compliance with those policies. The inquiry report raised a particular issue as to whether special rules were needed about collecting and retaining information on sitting members of Parliament. This agreement arose as a result.[7]

The agreement provides that the NZSIS will not generally direct the collection of information against any sitting member of Parliament. If it has a file on a person who becomes a member, it will be closed immediately and access to it prohibited for the duration of the member's term in Parliament (except for access by the member under the Official Information Act 1982 or the Privacy Act 1993). It may be reactivated once the member leaves Parliament only if the Director of Security is satisfied that this would be consistent with statutory obligations, and under express, written authorisation.

Collection of information against a sitting member of Parliament will be permitted only where the particular member is suspected of activities relevant to security, the collection is personally authorised by the Director of Security, and the Speaker is briefed confidentially about the proposed collection and the reasons for it. If it is necessary to obtain an interception or seizure warrant against a sitting member, the Director will brief the Speaker in confidence on the existence of and reasons for the warrant, and any conditions made in the warrant to protect parliamentary privilege. The Speaker can discuss the matter with the Minister in Charge of the New Zealand Security Intelligence Service.

Powers of the NZSIS

The New Zealand Security Intelligence Service Act 1969 provides for the NZSIS to obtain, correlate, and evaluate intelligence relevant to security. The NZSIS obtains such intelligence using various sources and methods. Information can be obtained by interception, and seizure can be undertaken, only in accordance with an interception warrant issued under the Act. Interception warrants for New Zealand citizens are issued jointly by the Minister in Charge of the New Zealand Security Intelligence Service and the Commissioner of Security Warrants. Other collection methods (such as observations) do not require formal, external authorisation such as a warrant.

If the legislative requirements have been met, the NZSIS has the power to carry out covert surveillance of members of Parliament. The Act makes provision for the gathering of security intelligence generally and does not contain any special provisions relating to

7 For further detail about the background to this agreement, see the *Interim report of the Privileges Committee on the question of privilege concerning the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS*, June 2013.

members of Parliament. In his 2009 report, the Inspector-General found that the NZSIS was not prohibited from collecting information about a member of Parliament, nor should members be protected from the proper exercise of the NZSIS's powers and functions, which are set out in statute. The Inspector-General noted, however, that as a general rule sitting members of Parliament should not be the proper subject of investigation by the NZSIS because of their functions and standing. Exceptions from the general rule would be better achieved through an understanding than by legislative amendment. The agreement we are considering is the result of that recommendation.

We note that the agreement respects the need for confidentiality in relation to such surveillance, but would equally expect to see respect for parliamentary proceedings expressed in it. We consider that the agreement should set out clear principles and its purpose, in place of its current historical introduction.

Recommendation

We recommend that the agreement with the New Zealand Security Intelligence Service be amended to include a statement of principles and purpose.

Role of the Speaker

There are two sets of circumstances set out in the agreement in which the Speaker would be briefed. The first is covered by clause 1.3 of the agreement, which states that the only circumstance in which collection of information may be directed against a sitting member of Parliament is where a particular member is suspected of undertaking activities relevant to security, the collection is personally authorised by the Director, and the Director provides a confidential briefing to the Speaker about the proposed collection and the reasons for it.

The decision of the NZSIS to commence collection of information about a sitting member might lead to the next step of obtaining a warrant for surveillance or interception. The requirement to inform the Speaker of the commencement of an investigation allows the discussion of issues about parliamentary privilege at an early stage. While the legal powers exist for the NZSIS to undertake its investigation, the actions of the NZSIS should be carried out with full regard to parliamentary privilege where members and the House are concerned. The Speaker, with advice from the Clerk of the House, will ensure that matters of parliamentary privilege are discussed with the NZSIS.

The second set of circumstances is covered by clause 1.4, which provides that if it becomes necessary to obtain an interception or seizure warrant against a sitting member of Parliament, the Director will brief the Speaker in confidence on the existence of and the reasons for the warrant, and any conditions contained in the warrant to protect parliamentary privilege.

While there is legal authority to obtain an interception or seizure warrant against a sitting member of Parliament, the execution of the warrant should be carried out with full regard to parliamentary privilege.

Section 4B of the New Zealand Security Intelligence Act 1969 requires that the warrant set out certain matters. They include the specific type of communication or document to be intercepted or seized, the identity of the people whose communications are to be intercepted, the place or facility where the documents or things are to be seized or located, and, where electronic tracking is undertaken, a description of the thing or the identity of

the person to be tracked. The warrant may also include any terms and conditions that the Minister and Commissioner both consider advisable in the public interest. The Minister and Commissioner must also consider whether to include any conditions in the warrant to minimise any risk that the warrant may affect third parties.

The Speaker is briefed by the NZSIS to ensure that the execution of the warrant and the conditions in it properly recognise parliamentary privilege. This is consistent with the approach taken in the memorandum of understanding for the execution of search warrants issued by the Police. We consider that in advance of such a warrant being issued, the Director of the New Zealand Security Intelligence Service should provide a written memorandum to the Speaker of the House setting out the actions done or information held by a member which in his or her opinion constitute an issue of security concern.

Some of us consider that we should make it clear that the Speaker should not be prevented from discussing the matter, as appropriate, with the Leader of the Opposition or other leaders of parliamentary parties. Others of us consider that, were this to happen, it may compromise the ability of the Speaker to receive a full briefing on the security matter at issue. However, all of us have confidence in the Speaker to protect the interests of members and the institution of Parliament.

Alternative processes considered

The briefings provide the Speaker with the opportunity to raise issues regarding parliamentary privilege; the Speaker does not have the power to decide whether or not an interception or seizure may proceed. We believe the Speaker should have this power, and that this matter needs to be rectified in the upcoming review of the security legislation. We considered whether such briefings should be limited to the Speaker only, as the representative of Parliament's interests in relation to ensuring parliamentary privilege.

Other options we considered included

- briefing someone connected with the House as well as the Speaker, such as the Leader of the Opposition or leaders of political parties
- briefing an external agency as well, such as the Inspector-General of Intelligence and Security or the Intelligence and Security Committee.

A difficulty with these options is that the briefing might include details about an operational matter involving a particular person which need to be closely held. Oversight of sensitive operational matters is generally beyond the authority of a body such as the Inspector-General of Intelligence and Security or the Intelligence and Security Committee. The purpose of the briefing is also to ensure that the NZSIS is made aware of matters of parliamentary privilege, and these bodies do not have expertise in this area. Some existing provisions in the legislation regulate the conduct of the NZSIS in its dealings with members of Parliament generally. Section 4AA of the Act requires the NZSIS to act in a way that is politically neutral and provides for regular consultation with the Leader of the Opposition to keep him or her informed about matters relating to security.

On balance, we agree that the protection of parliamentary privilege is appropriately vested in the Speaker. Upon taking up the role, the Speaker lays claim to the privileges of the House. He or she is the House's representative, and acts on behalf of the House in matters that may impact on it. Informing the Speaker about a matter that might impede or obstruct

a sitting member from performing their duties is a recognition that the Speaker embodies the House itself.

We also discussed the wider issue of whether there was a need to enhance the protections against surveillance of members being undertaken inappropriately. The NZSIS drew our attention to its statutory obligation to maintain political neutrality. Section 4AA of the New Zealand Security Intelligence Act 1969 provides that the Director of Security must take all reasonable steps to ensure the NZSIS is kept free from any influence that is not relevant to its functions and that it does not take any action for the purpose of furthering or harming the interests of any political party. The Director must also consult the Leader of the Opposition regularly to keep him or her informed about matters relating to security.

The oversight of the security agencies and their governing legislation is not within the scope of the agreement referred to us. However, the ability of members to undertake their duties free from inappropriate interference from other branches of government is a matter of concern. Members of Parliament must act lawfully, and this agreement provides a mechanism for the security agencies to undertake their duties if there is evidence that a member is of security concern. What would not be appropriate is misuse of this process for political ends. Any action by the state that has a chilling effect on the freedom of speech of members would be unacceptable.

These are serious issues, which we expect to see considered whenever the legislation governing the security agencies is reviewed.

Extent of agreement

We note that the NZSIS is not prevented under this agreement from directing the collection of information against a constituent or other person with whom a particular member is associated or in contact. Further, we note that the agreement does not extend to members' staff. We are concerned that any interception or seizure directed at a member's staff could incidentally result in the capture of material that was subject to parliamentary privilege, as some staff have access to such material. Accordingly, we would like to see the agreement adjusted to ensure that the Speaker is consulted in relation to any interception or seizure warrant to be executed on the parliamentary precincts or in a member's constituency office. We consider this would be in the interest of protecting Parliament's proceedings.

Recommendation

We recommend that the agreement with the New Zealand Security Intelligence Service be amended to require that the Speaker be consulted in relation to any interception or seizure warrant to be executed on the parliamentary precincts or in a member's constituency office; and in advance of such a warrant being issued, the Director of the New Zealand Security Intelligence Service should provide a written memorandum to the Speaker of the House setting out the actions done or information held by a member which in their opinion constitute an issue of security concern.

Disputes and disagreements

We considered what the Speaker could do if he or she were not satisfied that parliamentary privilege was being protected adequately. In the first instance, we expect any concerns would be discussed between the Speaker and the NZSIS at the briefing. If necessary, a new warrant should be sought to ensure that parliamentary privilege was adequately recognised.

One way to minimise conflict would be for the agreement to provide for obtaining the Speaker's view on any terms and conditions that should be inserted as advisable in the public interest in advance of a warrant being sought.

In our interim report on this matter, we recommended that the Inspector-General's role in overseeing the activities of the NZSIS and other security agencies be clarified. In order to maintain the appropriate constitutional boundaries, the oversight of the NZSIS's activities under this agreement should not be subject to the Inspector-General having to obtain the agreement of the Minister in Charge of the New Zealand Security Intelligence Service. To provide the assurance we are seeking in relation to this agreement, we consider the agreement should specifically provide that it also falls within the oversight of the Inspector-General in so far as it relates to the activities of the NZSIS. It would not be appropriate for the agreement to extend to the Inspector-General questioning parliamentary proceedings.

Recommendation

We recommend that the agreement with the New Zealand Security Intelligence Service specify that the Inspector-General has a role in overseeing the actions of the NZSIS in relation to the agreement.

Previous practice

We asked the NZSIS to what extent former and current members of Parliament may have been the subject of investigation by the NZSIS. The NZSIS informed us that it holds information about some people who have become members of Parliament, mostly collected before their election. Much of this information relates to the NZSIS's functions in relation to security clearances, for example where someone has been the subject of a security vetting or has acted as a referee for another person's security clearance.

The NZSIS told us that approximately 65 percent of the files it holds in relation to sitting members relate to vetting matters, 23 percent relate to matters of security interest (either the member was of security interest or they were in contact with a person of security interest), and the remaining 11 percent relate to various other matters, such as Official Information Act requests.

The NZSIS assured us that all hard-copy files relating to sitting members were stored securely, and only a single person had access to them.

5 Relationship between the enforcement agencies

In March 2013 Rebecca Kitteridge presented her report *Review of Compliance at the Government Communications Security Bureau*, which raised an issue in respect of the actions of the NZSIS that is relevant to the matter before us. The report identifies a long-standing practice, even prior to the enactment of the Government Communications Security Bureau Act 2003, of the GCSB's providing assistance (such as specialist capabilities) to the NZSIS on the basis of NZSIS warrants. The understanding within GCSB was that in such cases, section 14 of the Act (the restriction on intercepting communications of New Zealand citizens or permanent residents) did not apply, because the GCSB was acting as the agent of the requesting agency and was therefore operating under the legal authority of the warrants. If the NZSIS, with the authority of an intelligence warrant, requested the GCSB to provide assistance in cases involving New Zealand citizens or permanent residents, the GCSB provided assistance. The report documents the fact that in response to the issues leading to the review, the Director of the GCSB directed that almost all GCSB support for domestic agencies was to cease until the relevant legal issues have been resolved.

The enactment of the Government Communications Security Bureau Amendment Bill 2013 addressed issues arising out of this report. The Act provides legal authority for the GCSB to assist the New Zealand Defence Force, the New Zealand Police, the NZSIS, and other departments specified by an Order in Council in performing their lawful functions. The Explanatory Note of the bill as introduced noted that "In providing such assistance, GCSB will be confined to activities that the other entity is lawfully able to undertake itself (though it may not have the capability), and will be subject to any limitations and restrictions that apply to the other entity."

This amendment raises the issue of the extent to which the NZSIS or the New Zealand Police might involve the GCSB in respect of any surveillance, interception, or search warrant involving a member of Parliament. None of the agreements before us contemplate a situation where another agency might carry out or assist with functions on behalf of the agency entering into the agreement. As knowledge of this practice has only become public since the Kitteridge report, it is unlikely that the issue was contemplated by the Speaker at the time the agreements were entered into.

It may be prudent for all three agreements to require that any other organisation carrying out or assisting with functions under the agreement on behalf of another agency must also have regard to the authority of the Speaker as expressed in each of the agreements. Alternatively, the Speaker may wish to consider whether it might be necessary to enter into a separate agreement with the GCSB. On balance, we believe the latter approach is preferable.

Recommendation

We recommend that consideration be given to whether it is necessary for the Speaker of the House to enter into a separate agreement with the Government Communications Security Bureau, in the light of the organisation's potential role in assisting others in exercising their lawful authorities.

6 Question of privilege regarding the use of intrusive powers within the parliamentary precinct

We delayed making our report on this matter because part-way through our consideration we were referred a *Question of privilege regarding use of intrusive powers within the parliamentary precinct*. The issues associated with the question are also relevant to these agreements.

The incident leading up to the referral of that question concerned a request arising from a ministerial inquiry. While the ministerial inquiry did not have the power to compel the production of information, in the course of our consideration it came to our attention that there are a range of other powers in law, beyond those covered by these three agreements, where the production of documents or information can be compelled or required. For example, the Ombudsman has the power to compel the production of official information, and the Serious Fraud Office has a general power to require information to be produced. Like the powers of the New Zealand Police and the NZSIS, these powers of compulsion could be exercised within the parliamentary precinct.

In our report on the *Question of privilege regarding use of intrusive powers within the parliamentary precinct*,[8] we have recommended adopting a protocol which sets out how requests for information from parliamentary information and security systems should be dealt with. Where disclosure is not required or compelled by law, the protocol provides a process for dealing with information requests. Where disclosure is required under lawful authority, the protocol suggests that the process for the release of information should be based on the procedures set out in the search warrants agreement; that is, the opportunity to claim privilege must be provided.

We do not consider it practical or wise to develop individual agreements for the exercise of every possible coercive power within the precinct. We believe that generally the procedures set out in the search warrants protocol should be applied, to the extent possible. However, we also see scope for the Speaker to issue general guidance for agencies where information may be required or compelled to be produced at law. This guidance would sit alongside the search warrants protocol, and would fill the gap should clarification of the correct process to follow be needed for any particular agency.

[8] Privileges Committee, *Report on the question of privilege regarding use of intrusive powers with the parliamentary precinct*, 2014, I.17C.

Appendix A

Committee procedure

We met berween September 2012 and June 2014 to consider the question of privilege. We received evidence from the New Zealand Security Intelligence Service, the Parliamentary Service, and the New Zealand Police.

We received advice from Debra Angus, Deputy Clerk of the House of Representatives.

The evidence and advice received by the committee has been published on www.parliament.nz.

Committee members

Hon Christopher Finlayson QC (Chairperson)
Hon Gerry Brownlee
Dr Kennedy Graham
Chris Hipkins
Hon Murray McCully
Hon David Parker
Rt Hon Winston Peters
Grant Robertson
Hon Anne Tolley
Hon Tariana Turia

Committee advisers and staff

Debra Angus, Deputy Clerk of the House
Meipara Poata, Clerk of the Committee

Appendix B

Speaker's ruling

In recent years Speakers have entered into a number of agreements that have implications for the House and its members. On 24 March 2004, the House noted a report from the Privileges Committee on its consideration of a draft agreement on policing functions within the parliamentary precincts. Following the Privileges Committee's report, the Speaker and the Commissioner of Police signed a formal agreement, which was presented to the House on 24 June 2004. The agreement continues until termination, but is required to be reviewed every three years and may be amended by mutual agreement of the two parties. A revised agreement was signed on 12 December 2007. A further review is now due.

On 7 November 2006, the Speaker presented to the House a paper setting out interim procedures for the execution of search warrants on premises occupied or used by members of Parliament, and indicated to the House that she would seek to have the Privileges Committee consider it once the police investigation into the activities of Taito Phillip Field and any subsequent action was completed. A final order for repayment was made on 3 September 2012 and the proceedings are now at an end.

On 21 December 2010, I entered into a draft memorandum of understanding with the New Zealand Security Intelligence Service on the collection and retention of information on members of Parliament, the need for which arose from a 2009 report from the Inspector-General of Intelligence and Security following complaints from members.

All three of these agreements have the potential to raise issues affecting the privileges of the House.

Consequently, I have determined that they involve a question of privilege and, therefore, the question stands referred to the Privileges Committee.